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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,
Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,
Appellees.

On Appeal from a Three Judge United States District Court for the District of Maryland

Brief of the Association of American Colleges, the American Council on Education, the Association of Jesuit Colleges and Universities, the Council for the Advancement of Small Colleges, the National Association of Schools and Colleges of the United Methodist Church, the National Catholic Educational Association, and the National Council of Independent Colleges and Universities, Amici Curiae

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TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
INTEREST OF THE AMICI	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
I. The government may support the academic study of religion in colleges and universities, both public and nonpublic	8
II. The district court should not have enjoined the appellees from using any part of the state funds to support the study of religion	24
CONCLUSION	32

TABLE OF AUTHORITIES

CASES:

Calvary Bible Presbyterian Church v. *Board of Regents of the University of Washington*, 72 Wash. 2d 912, 436 P.2d 189 (1967), *cert. denied*, 393 U.S. 960 (1968) 12
Engel v. *Vitale*, 370 U.S. 421 (1962) 21
Epperson v. *Arkansas*, 393 U.S. 97 (1968) 9
Hunt v. *McNair*, 413 U.S. 734 (1973) 9, 21, 24, 30
Illinois ex rel. *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) 21
Meek v. *Pittenger*,——U.S.——, 43 L.W. 4596 (May 19, 1975) 2, 21
School District of Abington Township v. *Schempp*, 374 U.S. 203 (1963) 8, 21
State ex rel. *Sholes* v. *University of Minnesota*, 236 Minn. 452, 54 N.W. 2d 122 (1952) 12
Tilton v. *Richardson*, 403 U.S. 672, (1971) 7, 9, 20, 24, 31

BOOKS AND PERIODICALS: Page

Butts, R. F., *The American Tradition in Religion and Education* (1950) 15, 17, 19
Casad, *On Teaching Religion at the State University,* 12 Kan. L. Rev. 405 (1964) 14
Gauss, C. (ed.), *The Teaching of Religion in American Higher Education* (1951) 11, 12
Hartzell, K., and Sasscer, H. (ed.), *The Study of Religion on the Campus of Today* (1967) 12
Healey, R. M., *Jefferson on Religion and Public Education* (1962) 15
Holbrook, C., *Religion, A Humanistic Field* (1963) 12
Honeywell, R. J., *The Educational Work of Thomas Jefferson* (1931; reissued 1964) 15, 16
Howe, M., *The Garden and the Wilderness* 18
Jefferson, T., Minutes of the Board of Visitors, of the University of Virginia for October 7, 1822, in *The Complete Jefferson* 957-58 (ed. Padover; 1943)... 15
Jefferson, T., Minutes of the Board of Visitors of the University of Virginia for August 1-4, 1818, in *The Complete Jefferson* 957-58 (ed. Padover; 1943)... 16
Katz, W., *Religious Studies in State Universities,* 1966 Wis. L. Rev. 297 14
Kauper, P., *Law and Public Opinion,* in *Religion and the State University* 69 (ed. Walter; 1958) 13
Kauper, P., *Religion and the Constitution* (1964) 14
Kauper, P., *Religion, Higher Education and the Constitution,* 19 Ala. L. Rev. 275 (1967) 14
Ladd, *Public Education and Religion,* 13 J. Pub. L. 310 (1964) 14
Littell, F., *Church, State,* and *University,* 1963 Religion and the Public Order 78 (1964) 12
Louisell, D., and Jackson, *Religion, Theology, and Public Higher Education,* 50 Calif. L. Rev. 751 (1962) 14
Madison, J., Veto Message in Richardson, *Messages and Papers of the Presidents* 489-90 (1896) 18
McGonagle, J., *Teaching About Religion in the Public College and University,* 20 American Univ. L. Rev. 74 (1970) 14
McLean, M., and Kimber, H., *The Teaching of Religion in State Universities* (1960) 12
McLean, M., (ed.), *Religious Studies in Public Universities* (1967) 12

Page

Michaelsen, R., *The Legal Syndrome and the Study of Religion,* 35 J. Higher Education 373 (1964) 14
Michaelsen, R., *The Scholarly Study of Religion in College and University* (1964) 12
Michaelsen, R., *The Supreme Court and Religion in Public Higher Education,* 13 J. Pub. L. 343 (1964) 14
Michaelsen, R., *The Study of Religion in American Universities* (1965) 12
Novak, M., *Ascent of the Mountain, Flight of the Dove: An Invitation to Religious Studies* (1972) 12
Pfeffer, L., *Church, State and Freedom,* 423 (1953), 507-8 (rev. ed. 1967) 14
Phenix, P. H., *Religion in Public Education: Principles and Issues,* 14 J. Church and State 420 (1972) ... 12
Ramsey, P., and Wilson, J. F. (ed.), *The Study of Religion in Colleges and Universities* (1970) 12
Spivey, R. A., *Modest Messiahs: The Study of Religion in State Universities,* 63 Religious Education 5 (1968) 12
Walter (ed.), *Religion and the State University* (1958) 12
Welch, C., *Graduate Education in Religion: A Critical Appraisal* (1971) 12
Welch, C., *Religion in the Undergraduate Curriculum* (1972) 10, 11
Wittenburg, *The Relationship Between Religion and Educational Function of the University,* in *Religion and the University* (1964) 12
Ziemke, *An Experiment in the Teaching of Religion: The University of North Dakota,* 59 Religious Education 410 (1964) 12

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INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Maryland statutes, the pertinent provisions of the United States Constitution, the opinion of the court below, the

basis for jurisdiction in this Court, and the issues directly raised on this appeal are adequately set forth in the briefs filed on behalf of the Maryland Board of Public Works and the appellee colleges. All parties have consented in writing to the filing of this brief *amicus curiae* by the Association of American Colleges and the other organizations that have joined in this brief.

These *amici* fully support the constitutionality of Article 77A, §65 et seq. of the Maryland Annotated Code. The district court properly upheld the constitutionality of this statute as applied to the appellee colleges, and its judgment—with one important exception—should be affirmed. The exception relates to the district court's prohibition against any use of the public funds to support the theology and religion courses at the appellee colleges. This prohibition by the district court was an error and should be corrected.

Since none of the appellee colleges or the Board of Public Works has cross-appealed with respect to this prohibition, it might appear that the propriety of this prohibition is not properly before the Court in this case. Cf. *Meek* v. *Pittenger,* 43 L.W. 4596, 4598, fn. 7 (May 19, 1975). There can be no doubt, however, of the jurisdiction of this Court to modify the prohibition *sua sponte.* If the Court has jurisdiction to affirm the prohibition, the Court necessarily has jurisdiction to correct any error it contains.

If, however, the Court should judge that this case is not an appropriate vehicle for determining the propriety of the restriction, the *amici* filing this brief urge the Court to make an explicit reservation on the subject of the restriction. Such a reservation will pre-

vent any inference that the Court has approved the propriety of the restriction.

INTEREST OF THE AMICI

The Association of American Colleges and the other *amici* joining in this brief are gravely concerned about the misinterpretations that could result if this Court were simply to affirm the judgment of the court below. Such an affirmance would generate considerable confusion about the standards that lower courts should employ in determining whether a particular program of religious studies is truly academic or not. Moreover, such an affirmance might even raise doubts about the proper standards for determining the academic integrity of religious studies programs in public colleges and universities.

The *amici* filing this brief regard the academic study of religion as an essential part of a liberal arts education. Accordingly, the *amici* are profoundly concerned about preserving correct judicial standards for determining whether a particular program of religious studies is academic or sectarian. The creation of false criteria by the federal and state courts is certain to interfere with the academic study of religion in both public and nonpublic colleges and universities. Such interference would do irreparable harm to American higher education.

The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of complex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal ed-

ucation as distinct from professional or vocational training. The present membership of the Association in the United States (excluding three overseas institutions) comprises 738 colleges and universities—94 maintained by federal, state or local government and 644 controlled by independent boards of trustees, with or without some degree of affiliation with religious bodies. The total membership constitutes more than 50 percent of all accredited four-year institutions in the country.

The American Council on Education is a council of national and regional education associations and institutions of higher education. Since its founding in 1918, the Council has been a center of coordination for the improvement of education at all levels, with particular emphasis on higher education. Its membership and its activities reflect the peculiar genius of the American educational system—a system without national control, comprising a large number of autonomous units working together for the establishment and improvement of educational standards, policies, and procedures. Current Council membership comprises: 176 national and regional associations and organizations; 1,386 accredited institutions of higher education, including the four institutions involved in the case at bar; and 76 affiliated institutions and organizations.

The Association of Jesuit Colleges and Universities was formed in 1970 to effect better cooperative efforts among the 28 Jesuit colleges and universities throughout the United States, to promote the objectives of private and church-related higher education, and to assist other associations, groups and institutions pursuing the same goals. These 28 institutions include 6 moderately large universities, 8 four-year colleges, and 14

which offer degree programs through the Masters level. They are in 18 states and the District of Columbia, located for the most part in urban areas. Many of these institutions are the oldest in their respective states and have a proud tradition of liberal education.

The Council for the Advancement of Small Colleges (CASC) is a national, voluntary association dedicated to the promotion and advancement of small, independent private colleges of liberal arts and sciences. The Council plans and implements programs of mutual self-help, self-examination, and professional advancement for member colleges. The present membership comprises 154 liberal arts colleges in 40 states that enroll 2,000 or fewer undergraduate students. Ninety-eight percent of the colleges are fully accredited by regional accrediting associations, and two percent have attained at least Correspondence Status with their respective association.

The National Association of Schools and Colleges of The United Methodist Church is an incorporated body representing 107 colleges and universities, 13 secondary schools, 13 schools of theology, one professional medical college and several other schools with differing educational objectives. These institutions share varying degrees of affiliation with The United Methodist Church, but each operates under an independent board of trustees. Association membership includes 7 major universities which are defined as universities by their sponsorship of professional and graduate schools, 81 senior colleges and 19 two-year institutions. Academic programs of member institutions represent the full range of arts and sciences, the humanities, the fine arts and the professions.

The Department of Colleges and Universities of the National Catholic Educational Association is a voluntary organization of 219 higher education institutions that are Catholic in their sponsorship or traditions. Regional accreditation is an eligibility requirement for membership. The Department represents and services its members in a variety of areas of common interest. The National Catholic Educational Association has a compelling interest in this case that is not limited to the fact that four of the defendant colleges hold membership in the Association.

The National Council of Independent Colleges and Universities consists of 37 state associations of independent colleges and universities and more than 1000 private, nonprofit institutions of higher education. Organized in 1968, the principal purpose of the Council is to promote and advance the interests of higher education, including both publicly supported and independent colleges and universities, with special concern for the pluralistic nature of the system, its quality, freedom and responsibility.

SUMMARY OF THE ARGUMENT

This Court has already declared that the academic study of religion is supportable by public funds. The appropriateness and academic integrity of religious studies in higher education are amply demonstrated by the number and quality of the colleges and universities, both public and nonpublic, that include them in their curriculum. The almost unanimous public acceptance of the legitimacy of these programs is buttressed by the consensus of legal scholars that the No Establishment Clause does not bar teaching about religion in state-supported higher education. "No institution can consider itself a genuine college or a university if it ignores the place of religion as an intellectual discipline." (page 13)

Thomas Jefferson's plans for the University of Virginia show that what he intended to exclude from the curriculum of the university itself was the sectarian, not the academic, study of religion. James Madison concurred in Jefferson's views. In most 19th-century American colleges and universities, however, this strict compartmentalization of religion and education did not exist. Today there is general agreement that only the academic study of religion may be financed by public funds.

Public support of the academic study of religion serves important secular purposes, does not have a primary effect of advancing or inhibiting religion, and does not result in excessive governmental entanglement with religion. The government may support such study in private colleges and universities that meet the *Tilton* and *Hunt* criteria as well as in publicly owned and operated institutions.

The district court should not have enjoined the appellees from using any part of the state funds to support the study of religion. The district court, despite a full trial, refused to make any finding on whether the study of religion at the appellee colleges was academic or sectarian. The district court, however, did determine that the appellee colleges conformed closely to the colleges approved in *Tilton* v. *Richardson,* that they were not pervasively sectarian, and that all of the courses—including the religion courses—were taught "according to the academic requirements of the subject matter." The district court also determined that the appellee colleges were characterized by a high de-

gree of institutional autonomy, that the affiliated churches exercised no control over the budget or policies of the schools, and that each of the appellee colleges admitted students and hired faculty who were not members of the affiliated church. None of the appellee colleges required attendance at religious services.

In light of these findings, it was clearly erroneous for the district court not to hold the appellants to their burden of proof on the issue of the academic or sectarian character of the courses in religious studies at the appellee colleges. The injunction that the district court issued was not justified by the district court's concern about a "possibility" of "sectarian overtones." Neither was the injunction justified by the other factors to which the district court gave excessive weight: the limited array of courses at the appellee colleges, and the religious affiliation of the faculty members teaching such courses. The plaintiffs failed in their burden of proof, and the district court's concern about the bare possibility of some secondary sectarian dimension in the religion courses at the appellee colleges was not a sufficient warrant for excluding those courses from public support under the Maryland law.

ARGUMENT

I. The Government May Support the Academic Study of Religion in Colleges and Universities, Both Public and Non-Public.

This Court has already declared that the academic study of religion is supportable by public funds. In *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963), Mr. Justice Clark wrote for the majority:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment.

Subsequently, in *Epperson* v. *Arkansas,* 393 U.S. 97, 106 (1968), Mr. Justice Fortas wrote for the Court:

> While study of religion and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion.

In these passages the Court has distinguished the academic study of religion from the sectarian study of religion. The distinction turns on the methodology and the purpose of the instruction, not on the belief or disbelief of the instructor or the institution in the subject matter. When "presented objectively as part of a secular program of education," religious studies may be supported by the state and federal governments.

There is nothing contrary to this constitutional principle in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), or *Hunt* v. *McNair,* 413 U.S. 734 (1973). These decisions establish certain criteria that church-related colleges and universities must meet if they are to participate in government programs of aid to higher education. These decisions also hold that the programs of instruction that the government may assist at church-related

colleges and universities must be secular, that is, comparable to instruction provided at public colleges and universities and both separable and actually separated from the sectarian education and activities at the church-related colleges. There is nothing in *Tilton* or *Hunt* that says that religious studies at a church-related college or university are inherently suspect, much less that all religious studies are inherently sectarian.

The appropriateness and academic integrity of religious studies in higher education are amply demonstrated by the number and quality of the colleges and universities, both public and nonpublic, that include them in their curriculum. At the trial in this case, Dr. Samuel H. Magill, an Executive Associate on the staff of the Association of American Colleges, testified about the present extent of these studies. The defendants also introduced statistical material into evidence from Claude Welch, *Religion in the Undergraduate Curriculum* (Association of American Colleges; 1972). This statistical material is Defendants' Exhibit No. 1.

Dr. Magill's testimony and the statistical evidence show that in 1969-70 there were somewhat over 1300 four-year colleges and universities in the United States. Of this number, 870 offered either courses or full programs in religion. (Tr. 1633-34.) About 57% of all public colleges and universities, 67% of all private, independent colleges and universities, and close to 100% of the church-related colleges and universities offer courses in religion (Tr. 1635.) The greatest increase in course and program offerings in religious studies over the last 25 years has been in the public sector (Tr. 1637.)

Of particular significance are Tables 8 and 9 in Defendants' Exhibit No. 1, which were explained by Dr.

Magill in his testimony (Tr. 1640-43) and are summarized on pp. 56-57 of Claude Welch, *Religion in the Undergraduate Curriculum*:

> One further variable is important to note in relation to the distribution of programs of religious studies, namely, institutional quality. It appears that, second to religious affiliation, the presence of a religious program is most strongly associated with the academic quality of an institution. The higher the quality the greater the likelihood of there being a program of religion. This appears from two comparative studies, one using Cass and Birnbaum's ratings of institutions according to selectivity in admissions, and the other using the resource index score developed by George Nash in a study made from the Bureau of Applied Social Research, Columbia University.

Of the schools ranked by Cass and Birnbaum in the top selectivity group, 79% have an organized religion program. Of the schools ranked by the Nash Resource Index as high resource institutions (the top 13% in the country), 85% have a religion program. The colleges and universities that ranked lower on both indexes also ranked lower in the percentages offering religious studies. The Cass-Birnbaum and the Nash ratings are highly regarded in the academic community. (Tr. 1641-42.)

The subject of religious studies in the higher education curriculum, both public and nonpublic, has been studied extensively in many publications since World War II.[1] Very significantly, however, there has been

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[1] In addition to the Welch study, *supra*, the following works are of particular importance to an understanding of the range and extent of religious studies in American higher education: Gauss (ed.), *The Teaching of Religion in American Higher Education*

almost no litigation with respect to religious studies programs in higher education, even at public colleges and universities. In sharp contrast to the many cases dealing with religion in the public elementary and secondary schools and with aid to education in parochial elementary and secondary schools, there are only two reported cases dealing with religious studies at public institutions of higher learning. In the first of these, *State* ex rel. *Sholes* v. *University of Minnesota,* 236 Minn. 452, 54 N.W. 2d 122 (1952), the plaintiffs' suit was dismissed on procedural grounds. In the second, *Calvary Bible Presbyterian Church* v. *Board of Regents of the University of Washington,* 72 Wash.2d 912, 436 P.2d 189 (1967), the Supreme Court of Washington sustained the constitutionality of the state university course in "The Bible as Literature," and this Court denied certiorari. 393 U.S. 960 (1968).

(1951); Hartzell and Sasscer (ed.), *The Study of Religion on the Campus Today* (1967); Holbrook, *Religion, A Humanistic Field* (1963); Littell, *Church, State, and University,* 1963 Religion and the Public Order 78 (1964); McLean and Kimber, *The Teaching of Religion in State Universities* (1960); McLean (ed.), *Religious Studies in Public Universities* (1967); Michaelsen, *The Scholarly Study of Religion in College and University* (1964), *The Study of Religion in American Universities* (1965); Novak, *Ascent of the Mountain, Flight of the Dove* (1972); Phenix, *Religion in Public Education: Principles and Issues,* 14 J. Church and State 420 (1972); Ramsey and Wilson (ed.), *The Study of Religion in Colleges and Universities* (1970); Spivey, *Modest Messiahs: The Study of Religion in State Universities,* 63 Religious Education 5 (1968); Walter (ed.), *Religion and the State University* (1958); Welch, *Graduate Education in Religion: A Critical Appraisal* (1971); Wittenberg, *The Relationship Between Religion and the Educational Function of the University,* in *Religion and the University* (1964); Ziemke, *An Experiment in the Teaching of Religion: The University of North Dakota,* 59 Religious Education 410 (1964).

The almost unanimous public acceptance of the legitimacy of these programs is buttressed by the consensus of legal scholars that the No Establishment Clause does not bar teaching about religion in state-supported higher education. The views of the late Professor Paul Kauper are typical of most of the other constitutional authorities who have addressed the question:

> As long as courses in religion are optional with the student, preference is not given to any single religious faith, the instruction is aimed at understanding and not indoctrination or commitment, and the university insists on observance of its usual academic and scholastic standards with respect to the teachers giving the courses, a persuasive case may be made that this program does not fall within the "sectarian education" category. ("Law and Public Opinion," in *Religion and the State University* 84 [ed. Walter; 1958].)

Returning to the same topic in a book published a year after the *Schempp* decision, Professor Kauper restated his position as follows:

> No institution can consider itself a genuine college or a university if it ignores the place of religion as an intellectual discipline. The very fact that we have curricula in religion at our state institutions and that the matter continues to be the subject of much study marks an awareness by our educational leaders that religion must find its place in the total educational system. Indeed, it has been persuasively argued that the study of theology is appropriate to a state institution. No state university can have a theological position any more than it can have a political position. But just as freedom from a political position does not preclude a study of political science, so lack of commitment to a theological position does not

> preclude a study of theology. What is important is that the state should not promote a particular theology for purposes of religious indoctrination, but that rather it should afford opportunity for study of religious ideas, religious behavior, and religious institutions at the hands of competent scholars. A university offers the widest latitude to teachers in presenting value systems and avenues to the pursuit of truth. It is hardly neutral if it denies opportunity for teaching, research, and study centered on religion in its historical, theological, institutional, and social aspects. (*Religion and the Constitution* 98-99 [1964].)

It would be a waste of this Court's time to pile quotation upon quotation to demonstrate the consensus of legal scholars that the No Establishment Clause does not bar the academic study of religion in state colleges and universities.[2] It should be sufficient to note that Leo Pfeffer also agrees that state-supported colleges and universities may engage in the academic study of religion.[3]

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[2] A comprehensive collection of the authorities can be found in McGonagle, *Teaching About Religion in the Public College and University,* 20 American Univ. L. Rev. 74 (1970). Among the most important works by legal scholars are the following: Casad, *On Teaching Religion at the State University,* 12 Kan. L. Rev. 405 (1964); Katz, *Religious Studies in State Universities,* 1966 Wis. L. Rev. 297; Kauper, *Religion, Higher Education and the Constitution,* 19 Ala. L. Rev. 275 (1967) (in addition to the two works cited in the body of this brief); Ladd, *Public Education and Religion,* 13 J. Pub. L. 310 (1964); Louisell and Jackson, *Religion Theology, and Public Higher Education,* 50 Calif. L. Rev. 751 (1962); Michaelsen, *The Legal Syndrome and the Study of Religion,* 35 J. Higher Education 373 (1964), and *The Supreme Court and Religion in Public Higher Education,* 13 J. Pub. L. 343 (1964).

[3] Pfeffer, *Church, State and Freedom* 423 (1953), 507-8 (rev. ed. 1967).

Many of the authors who have written on this subject have taken note of Thomas Jefferson's plans for the study of religion at the University of Virginia. Because of Jefferson's special place in the history of American education and religious freedom, his concepts deserve special scrutiny.[4]

As the minutes of the Board of Visitors of the University of Virginia for October 7, 1822 show,[5] Jefferson and the other members of the board agreed that a "chasm" would exist at the university if no provision were made for the study of "the various creeds of religious faith existing among our citizens."

> [T]he relations which exist between man and his Maker, and the duties resulting from those relations are the most interesting and important to every human being, and the most incumbent on his study and investigation.

Jefferson, however, did not want the University of Virginia to engage in sectarian teaching and was opposed to the establishment of "any professorship of divinity" in the university. He agreed to instruction in the Hebrew, Greek and Latin languages and to "courses of ethical lectures, developing those moral obligations in which all sects agree." But he was adamantly opposed to the university itself engaging in the same kind of religious instruction that would be found in the "sectarian schools of divinity."

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[4] See, for example, Butts, *The American Tradition in Religion and Education* (1950); Healey, *Jefferson on Religion and Public Education* (1962); Honeywell, *The Educational Work of Thomas Jefferson* (1931; reissued 1964).

[5] Padover (ed.), *The Complete Jefferson* 957-58 (1943).

Jefferson's solution was to encourage the various sects to establish their own schools of divinity "on the confines of the University." The students destined "for the religious professions" could then obtain their full secular education at the university and their sectarian education at the surrounding church institutions. Under this plan, the university could stay free of the "jealousies of the different sects."

At first blush, then, it would appear that Jefferson excluded the study of religion from the state university. That interpretation, however, is quite superficial. Close attention to the curricula that Jefferson proposed for the University of Virginia shows conclusively that what Jefferson intended to exclude was the sectarian, not the secular, study of religion.[6] All of the curricula include Moral Philosophy or Ethics, subjects that inevitably touch upon religious matters. In the "Rockfish Report," Jefferson and the other members of the Board of Commissioners for the University of Virginia gave a detailed explanation of the aims and curriculum they proposed for the university. The key passage on religious studies reads as follows:[7]

> In conformity with the principles of our Constitution, which places all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment and surprise, and with the sentiments of the Legislature in favor of freedom of religion, manifested on former occasions, we have proposed no professor of divinity; and the rather as the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; to which adding the developments of these moral obligations, of those in which all sects agree, with a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed common to all sects. Proceeding thus far without offence to the Constitution, we have thought it proper at this point to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets.

[6] A convenient chart of these curricula may be found in Honeywell, *The Educational Work of Thomas Jefferson* 110-11 (1931; reissued 1964).

[7] Padover (ed.), *The Complete Jefferson* 1104 (1943). The meeting of the commissioners at Rockfish Gap occurred August 1-4, 1818.

By today's standards, Jefferson's professor of ethics was hardly nonsectarian. Nevertheless, the point is clear that what Jefferson meant to exclude from the University of Virginia was not the secular study of religion, but the sectarian rivalries of his day. Fortunately, even though Jefferson's plan for the peripheral seminaries was never realized, his hopes for greater religious tolerance and peace have achieved some realization through the growth of the ecumenical spirit and interdenominational cooperation.

As is well known, the views of James Madison, another progenitor of the First Amendment, were generally similar to Jefferson's on religion and education. Madison, as Rector of the University of Virginia, insisted in 1829 that "provisions for religious instruction and observance among the students" be made by the students themselves or their parents and guardians.[8] There is no evidence that he changed the duties of the

[8] Butts, *The American Tradition in Religion and Education* 130 (1950).

professor of ethics. Moreover, it is interesting to note that although Madison vetoed the incorporation of the Protestant Episcopal Church in the District of Columbia,[9] he signed the Congressional charter of Georgetown University, an institution he must have known was Roman Catholic and Jesuit.[10]

The special role of Madison and Jefferson in the development of American religious freedom is beyond dispute. At the same time, it would be a gross distortion of history to read into the First Amendment everything that Madison and Jefferson wrote about religious freedom,[11] particularly with respect to education. The views of Madison and Jefferson were much stricter than those shared by most members of the first Congresses, as is amply shown by the provisions those Congresses made for the support of religion and education in the federal territories.[12] And so far as the state legislatures were concerned, Virginia's severity in religious matters was a distinct exception—shining, perhaps, but singular. Even the most devout admirers of Madison and Jefferson concede that the careful compartmentalization of religion and education at

[9] Richardson, *Messages and Papers of the Presidents* 489-90 (1896).

[10] Act of March 1, 1815, 6 Stat. 152.

[11] Howe, *The Garden and the Wilderness* (1965).

[12] The early territorial ordinances did not provide for the support of the ministry as such, but they clearly envisaged a religious dimension in education. "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, Art. 3. This Ordinance was reenacted August 7, 1789, by the first session of the First Congress under the Constitution. 1 Stat. 549. The language of Article 3 was repeated in the Southwest Ordinance of 1790.

the University of Virginia was not typical of other 19th-century state colleges and universities.[13]

Today, of course, after the late 19th-century incorporation of the "Blaine Amendment" in most state constitutions and after this Court's decisions of the last thirty years, no one could seriously contend that public institutions of higher education are constitutionally free to engage in the kind of sectarian instruction that was prevalent through much of the 19th century. Indeed, during the period between World War I and World War II, there was a great decline in religious studies of any kind at state colleges and universities and even in the private, independent sector. Since World War II, however, there has been a great resurgence in religious studies, not of the sectarian type, but as a distinctly academic discipline.[14] As we have already shown, a widespread consensus of the public, of legal scholars and of academicians supports the legality and propriety of secular religious studies at public as well as private colleges and universities.

During the last thirty years, this Court has articulated three guidelines to help in determining whether a particular law violates the No Establishment Clause. Since the Free Exercise Clause also plays a critical role in the resolution of church-state problems, there are

[13] Butts, *The American Tradition in Religion and Education* 130 (1950): "At a time when, in most colleges and universities of the country, ministers were presidents and commonly members of boards of control, daily chapel attendance was compulsory, courses in religion were required, and professors of theology and doctors of divinity had a prominent place on the faculties, the University of Virginia stood out sharply in contrast with its loyalty to the principle of separation of church and state."

[14] Testimony of Dr. Magill at the trial (Tr. 1634-35).

four questions, as Chief Justice Burger noted in his opinion in *Tilton* v. *Richardson* (403 U.S. at 678), that must be answered whenever a challenge is made to the constitutionality of a particular state program under the Religion Clauses of the First Amendment:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

In their briefs in this case, the Maryland Board of Public Works and the appellee colleges have shown that the answers to these questions establish the constitutionality of Article 77A, § 65 et seq., of the Maryland Annotated Code, as the statute was applied to the colleges in this case by the district court. The *amici* filing this brief urge this Court to hold that the answers to the four constitutional questions also establish the permissibility of governmental support of the academic study of religion at the appellee colleges.

The secular purpose in governmental support of the academic study of religion derives from several considerations:

(1) The academic study of religion is widely regarded as an essential part of a liberal arts education. The provision of such education is one of the most important functions of government.

(2) Preservation of the values protected by the First Amendment will be impossible unless the leadership of our country has a sound knowledge of religion and religious institutions, as well as of government and political institutions.

(3) The interplay of law and religion in our society is so constant and so complex that it is desirable for the citizenry to have an opportunity to make a serious study of what religion has meant and still means in American life.

(4) To the extent that education has an ethical dimension, it is impossible to exclude the study of religion and still provide an adequate course of instruction in the value systems that have motivated and still motivate human behavior.

Government support of the academic study of religion will not have a primary effect of advancing or inhibiting religion. In the cases in which the primary effect test has been applied so far, only two types of laws have been held unconstitutional: government support of sectarian instruction and religious exercises in the public schools,[15] and special governmental assistance for the education of children in church-related elementary and secondary schools.[16] As Mr. Justice Powell said for the Court in *Hunt* v. *McNair:*[17]

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

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[15] *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *School Dist. of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

[16] Most recently, in *Meek* v. *Pittenger,* 43 L.W. 4596 (1975).

[17] 413 U.S. at 743.

In the present case the trial court found that the appellee colleges "are not so pervasively sectarian that aid would have a primary effect of advancing religion." [18] With respect to the theology and religion courses at the appellee colleges, the trial court did not find that they were a "specifically religious activity." Rather, the court declared that "a possibility existed that these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." [19] It is quite clear, however, that the district court was simply speculating about this possibility. Had any hard evidence existed, the court would surely have found that the study of religion at one or more of the appellee colleges was sectarian, not academic, and therefore, not supportable by public funds. As will be shown more fully in the next section of this brief, this "speculation about possibilities" was an error by the district court in a case involving higher education at a college that was found to have met the *Tilton* and *Hunt* criteria.

Finally, there is no reason to fear excessive government entanglement, either administrative or political, in programs of governmental support for the academic study of religion in institutions of higher education that are either publicly conducted or that meet the *Tilton* and *Hunt* criteria. The administration, faculty and students of such institutions may safely be trusted to complain whenever a course, ostensibly offered as an academic pursuit, is distorted into a tool of sectarian indoctrination. It is particularly noteworthy in the instant case that the plaintiffs were unable to produce

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[18] 387 F. Supp. at 1287.

[19] 387 F. Supp. at 1288.

a single administrator, faculty member or student at the appellee colleges to support their charge that the religion courses had a dimension or purpose of indoctrination.

In the aid-to-education cases at the elementary and secondary level, this Court has held that the pervasively sectarian character of the church-related schools necessitated close governmental surveillance of many types of assistance, and that the need for such surveillance rendered the programs unconstitutionally entangling. The Court has held just the opposite in the case of church-related colleges and universities that meet the *Tilton* and *Hunt* criteria. The greater maturity of the students, the clear dominance of the secular educational aim, and the self-policing character of institutions that truly enjoy an atmosphere of academic freedom are sufficient guarantees against excessive governmental entanglement.

So far as the free exercise of religion is concerned, it is manifest that the academic study of religion does not result in any coercion against the plaintiffs with respect to their religious beliefs or practices or against anyone else. The argument that the expenditure of public funds for a purpose that is inconsistent with a taxpayer's religion violates the Free Exercise Clause is an argument whose acceptance can only mean fiscal anarchy. If such an argument is accepted, Catholic taxpayers can prevent the public funding of elective abortions, the Amish can destroy the Social Security system, and the Quakers can prevent the defense of the country in time of war. The No Establishment Clause stands as a high barrier against government subsidy of distinctly religious activities, such as worship and sectarian instruction. The Free Exercise Clause does not

stand as a guarantee that public monies will be spent only for purposes that are totally acceptable to all the religions, organized and individual, in the United States.

The decisions of this Court, the practices of the leading state and private colleges and universities, the consensus of the legal scholars, the views of Madison and Jefferson, and the application of the guidelines this Court has established for cases arising under the Religion Clauses of the First Amendment all support the constitutionality of government support for the academic study of religion. It would be astonishing if government could support such study only in institutions that are publicly owned and operated. Fortunately, the decisions of this Court in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), and *Hunt* v. *McNair,* 413 U.S. 734 (1973), hold that the government may support secular studies in private, including church-related, colleges and universities that meet the *Tilton* and *Hunt* criteria. As a result, Maryland is under no constitutional compulsion to exclude the study of religion at appellee colleges from public support, if those colleges meet the *Tilton* and *Hunt* criteria and if the study of religion at these colleges is academic in character.

II. The District Court Should Not Have Enjoined the Appellees from Using Any Part of the State Funds To Support the Study of Religion.

The district court determined that the appellee colleges conformed closely to the colleges approved in *Tilton* v. *Richardson,* that they were not pervasively sectarian, and that all of the courses—including the religion courses—were taught "according to the academic requirements of the subject matter." 387 F. Supp. at 1287. Nevertheless, the district court enjoined the

appellees from using any part of the state funds to support the study of religion.

In Part III of the Findings of Fact, Judge Young states:

> The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools. It may be that at each the subjects are approached as complex and intriguing intellectual disciplines. However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience. Only the clearest indication that the religion or theology department is an amalgam of people interested in the study of the religious phenomenon or experience, rather than in experiencing religion, justifies state support of the department in the light of that secondary objective. There has been no such indication for any of these defendants. However, the Court's findings as to the chaplaincy program and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants. (387 F. Supp. at 1296.)

In the actual Opinion of the district Court, Judge Young states:

> The only qualification to this general conclusion is as to theology and religion courses. The fact finder was unable to characterize the course offerings in these subjects available at the various defendant schools. Even though academic freedom prevailed at each defendant school and there was no indication that religious indoctrination was a goal of these schools, a possibility existed that these

> courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline. Theology or its equivalent is a required course at each school and in each case is taught by a cleric of the affiliated church. Absent a clear indication that the theology was taught as an academic discipline, state aid to such programs cannot be justified. As no such indication exists as to these defendants, the Council on Higher Education must take steps to ensure that public funds are not used to support such programs. (387 F. Supp. at 1287-88.)

These passages from the Findings of Fact and the Opinion raise the most serious issues about the power and the proper criteria for the federal district courts to employ when resolving controversies that involve the No Establishment Clause and religious studies programs in higher education. The *amici* filing this brief urge this Court not to affirm this part of the district court's decision and not to pass over the question in silence. At the very least, the decision of the appellees not to cross-appeal on this point should be noted by this Court in its opinion and the question reserved.

There can be no question of the *power* of the district court to determine whether the courses in religion at the appellee colleges were academic or sectarian in character. If taxpayers in Maryland brought suit challenging courses in religion at the University of Maryland, the federal district court would have to resolve the suit on the merits. It could not simply presume that the courses were offered in a truly academic manner because they were offered at a state university. Similarly, since there was a full trial in the instant case, the district court was under a duty to decide the factual issues on the basis of the evidence before it—a decision

that the trial court refused to make. 387 F. Supp. at 1297, fn. 9.

The district court had no difficulty in determining that the appellee colleges "are characterized by a high degree of institutional autonomy" and that the affiliated churches "exercise no control over the budget or policies of the schools." 387 F. Supp. at 1287, fn. 7. The district court also determined that each of the appellee colleges "admitted students and hired faculty who were not members of the affiliated church" and that none of the appellee colleges required attendance at religious services. 387 F. Supp. at 1287. It certainly was not beyond the power of the district court also to resolve the issue whether the courses in theology and religion were academic or sectarian.

Much of the difficulty of the district court lay in the criteria it considered relevant. Apparently the district court was concerned by the fact that each of the appellee colleges "has as a secondary purpose the encouragement of the spiritual development of the students," even though the court found that "at none of these schools does this encouragement go beyond providing opportunities for religious experience." 387 F.Supp. at 1290. The district court was satisfied that each of the appellee colleges was autonomous, staffed by faculty hired on the basis of academic merit, nondiscriminatory in admissions, enjoyed academic freedom, taught all its courses in accordance with their requirements as academic disciplines, and did not have religious indoctrination as a purpose—but the court was still concerned about the "possibility" that the religion courses could be devoted to "deepening religious experiences" rather than to teaching theology or religion as an academic discipline.

The short answer to the district court's concern is that higher education is not a sterile, abstract exercise of the intellect. If a student, as a result of studies in history, literature, art, philosophy or religion, moves into a deeper examination of his own beliefs and values, the natural result in many cases will be the student's own personal decision to reject, modify or reaffirm those beliefs and values. The college acts as a catalyst, not a catechist. The possibility that the student may make a decision in accord with the beliefs and values of the church that is affiliated to some degree with the college does not turn the college into a sectarian tool of the church.

The deepening of religious experience is an important educational objective even when the educational institution has no concern whatever with the ultimate religious choice of the student.[20] Helping students to an awareness in the heart as well as in the mind of what religion has meant in human experience will result in a far greater understanding by the student of his fellow men. It is a grave mistake to believe that higher education consists only in filling the brains of students with scientific, statistical and historical data. It is also a function of higher education to awaken students to experiences that have been significant in human history. The deepening of religious experience is in no sense incompatible with the academic study of religion.

The district court was also troubled by the "limited array" of the theology and religion courses at the

[20] As Dr. Magill testified at the trial, the academic objective of religious studies is understanding, and understanding is more than mere knowledge about religion. Understanding involves a perception and appreciation of religious experience—an empathy—regardless of the ultimate personal stance individual students may take on religion. Tr. 1653-54.

appellee colleges. At the trial, Dr. Magill gave uncontradicted testimony that the catalog descriptions and range of religious studies at the appellee colleges

> . . . represent the kind of approach to the study of religion that one would find in any self-respecting quality institution. And they represent, I would say, a range of course content that is quite acceptable. They vary considerably from institution to institution, but I would say that they are not at all atypical, when you take a look at the entire spectrum of American undergraduate education. (Tr. 1645.)

Without saying so explicitly, the district court seems to have subscribed to the theory that the way to make the study of religion academic is to offer a broad range of courses covering as many religions as possible. To impose such a requirement makes it impossible for a small or medium-sized college to engage in the academic study of religion. Many factors enter into a faculty's decisions about the content of a college curriculum. Among these are the resources of the college, available teachers, the rights of tenured teachers and the degree of student interest in particular subject matter. The district court found that the affiliated churches "exercise no control over the budget or policies of the schools." 387 F. Supp. at 1287, fn. 7. Absent a showing of church control of the curriculum, there was no reason for the district court to doubt the good faith and judgment of the faculty about the proper curriculum for the colleges to offer in religion and theology.

Another factor the district court mentioned as causing the "possibility" of a sectarian dimension in the religious studies programs at the appellee colleges was that the courses were taught, at least for the most

part,[21] by members and clergymen of the churches affiliated with the colleges. The choice by the colleges of such teachers has many legitimate explanations, and it was error for the district court to give such great weight to the possibility that these teachers might be missionaries masquerading as professors. Judging the academic character of religious studies by the religious affiliations of the faculty members is dangerous business and tends towards the absurd result that the study of religion will be academic only when none of the professors in the department believe in anything they are teaching.

The most fundamental error of the district court, however, lay in its shifting of the burden of proof to the defendants on the issue of the academic character of their religious studies. In *Hunt* v. *McNair,* Mr. Justice Powell stated for the Court:

> Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen,* 392 U.S. at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation. (413 U.S. at 746, fn. 8.)

[21] One of the appellee colleges, Loyola College, has a rabbi on its faculty in the religious studies department.

Exactly the same situation obtains in the instant case. The district court should have resolved all ambiguities against the appellants, not against the appellees, especially since the district court determined that the appellee colleges fully met the *Tilton* and *Hunt* criteria. Appellants had ample opportunities through discovery procedures to amass evidence, if any existed, that the study of religion at the appellee colleges was sectarian, not academic. All the appellants were able to do was to induce the district court to say that a "possibility" existed. Such a possibility does not satisfy the appellants' burden of proof. As Chief Justice Burger said in his opinion in *Tilton* v. *Richardson:*

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional. (403 U.S. at 679.)

The district court's concern about the possibility of some secondary sectarian dimension in the religion courses at the appellee colleges was not a sufficient warrant for excluding those courses from public support under the Maryland law.

The district court noted that "[t]heology or its equivalent is a required course at each school." 387 F. Supp. at 1288. This requirement, however, derives from the fact that each of the appellee colleges is a liberal arts institution, and that the academic study of religion is an essential part of a liberal arts education. Such education is aimed at opening the student to the entire range of human experience. So long as the

study is truly academic, there can be nothing unconstitutional about requiring students who have elected such education to take religion or theology courses.

CONCLUSION

For the reasons stated, the Association of American Colleges and the other *amici* filing this brief urge this Court to affirm the judgment below, but without the restriction against the use of public funds for the support of the religious studies programs at the appellee colleges. If, however, the Court deems it inopportune to modify the judgment below in this case, these *amici* urge the Court explicitly to note the decision of the appellees not to cross-appeal with respect to the prohibition, and explicitly to reserve the question whether the prohibition was necessary and correct.

Respectfully submitted,

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